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No. 80-403

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES R. GOULD, DOING BUSINESS AS BROKERS FOR AGRICULTURAL COOPERATIVE ASSOCIATIONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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Petitioner contends that the court of appeals erred in upholding the statutory authority of the Interstate Commerce Commission to inspect records of transportation brokers claiming exemption from regulation.

1. Petitioner claims to be a sole proprietor acting as a broker of transportation services provided by agricultural cooperatives that are partially exempt from regulation by the Interstate Commerce Commission. Beginning in October 1977, Commission investigators made several oral and written requests to inspect petitioner's transportation-related business records pursuant to 49

U.S.C. (Supp. II) 11144(b).[1] After these requests were refused, the Commission brought this action in the United States District Court for the Western District of Pennsylvania, seeking an injunction to require petitioner to make the records available for inspection. Petitioner claimed that an injunction should not issue because: (a) his business is exempt from the jurisdiction of the Commission, which therefore lacked statutory authority to inspect the records; (b) the requests were made in bad faith; and (c) the records were protected by the Self-Incrimination Clause of the Fifth Amendment.[2] The district court granted summary judgment for the Commission.

2. On appeal, the court of appeals upheld the Commission's statutory authority to inspect petitioner's business records, despite petitioner's claim that his business is exempt from regulation (Pet. App. 6-13). The court also held that the Commission's inspection procedures were reasonable, that they had been carried out in good faith, and that they were consistent with this Court's decisions in *United States* v. *La Salle National Bank*, 437 U.S. 298 (1978), and *United States* v. *Powell*,

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[1]Section 11144(b) provides in pertinent part:

> The Commission, or an employee designated by the Commission, may on demand and display of proper credentials—
>
> (1) inspect and examine the lands, buildings, and equipment of a carrier, broker, or lessor; and
>
> (2) inspect and copy any record of—(A) a carrier, broker, lessor, or association; * * *

We refer in this memorandum to sections of the Interstate Commerce Act as recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Section 11144(b) was formerly codified at 49 U.S.C. 320(d).

[2]In the district court, petitioner also asserted that the investigation would violate his Fourth Amendment rights. Petitioner did not rely on that ground in the court of appeals, and he does not raise it here.

379 U.S. 48 (1964) (Pet. App. 14-25). Finally, the court found that the record provided an insufficient factual basis for deciding the merits of petitioner's Fifth Amendment claim. The court reasoned (Pet. App. 26-29) that the Commission's inspection procedures would not violate petitioner's Fifth Amendment rights if the procedures were essentially equivalent to a search and did not require petitioner's assistance in locating or identifying particular documents. See *Andresen* v. *Maryland*, 427 U.S. 463 (1976). If, on the other hand, the procedures required petitioner or his agents to "point out, segregate, assemble, or turn over certain documents" (Pet. App. 28), the court remarked that the procedures would be analogous to a subpoena and "the ICC may be foreclosed from obtaining inspection of documents for which [petitioner] is able to claim his fifth amendment privilege specifically * * *" (Pet. App. 30). See *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974). Because the record did not show whether the Commission's inspection procedures were more similar to a search than to a subpoena, the court remanded the case for further evidence as to the nature of the planned inspection (Pet. App. 31-32).

3. Petitioner does not contend here, as he did in the court of appeals, that the Commission lacks authority under 49 U.S.C. (Supp. II) 11144(b) to inspect his records. He now asserts (Pet. 11-18) only that the Commission was required by the Due Process Clause and the Administrative Procedure Act to afford him a hearing with respect to his jurisdictional claim before conducting the inspection, the very purpose of which is to determine jurisdiction. That contention, which is unsupported by authority, is insubstantial.

It is well established, as the court of appeals correctly held (Pet. App. 6-13), that an agency may use its statutory powers of investigation for the purpose of determining whether a particular business is subject to the agency's jurisdiction. See, *e.g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209-214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507-509 (1943); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). Neither the Due Process Clause nor the Administrative Procedure Act[3] requires a hearing concerning jurisdiction before an agency may exercise those powers. The jurisdiction of the agency can always be challenged in the event that it ultimately seeks to enforce the substantive requirements of the statute. However, premature jurisdictional arguments should not be permitted to thwart the Commission's initial inquiries, which are essential to determining its jurisdiction. *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 213-214; *Endicott Johnson Corp.* v. *Perkins*, *supra*, 317 U.S. at 509; *SEC* v. *Brigadoon Scotch Distributing Co.*, *supra*, 480 F. 2d at 1052-1053.

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[3]Although petitioner now contends (Pet. 14-15) that the proposed inspection would violate the APA, that argument was not raised in the court of appeals and it therefore is not properly presented here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner's contention, which rests on 5 U.S.C. 555(c), is insubstantial in any event because, as petitioner notes (Pet. 15), "it has been held many times that [that section's requirement that inspection be] * * * 'in accordance with law' does not give the court authority to determine the agency's jurisdiction over the individual from whom the information is subpoenaed * * *." See *Tobin* v. *Banks & Rumbaugh*, 201 F. 2d 223, 225-226 (5th Cir.), cert. denied, 345 U.S. 942 (1953). It is settled that an administrative subpoena will be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Accord, *EEOC* v. *University of New Mexico*, 504 F. 2d 1296, 1302-1303 (10th Cir. 1974).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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